SERVED: February 28, 1992

NTSB Order No. EA-3500

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of February, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v. SE-10016

RUSSELL W. SWANSON,

Respondent.

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Patrick G. Geraghty issued in this proceeding on September 14, 1989, at the conclusion of an evidentiary hearing.[1] By that decision the law judge affirmed an order of the Administrator suspending respondent's airline transport pilot ("ATP") certificate on

[1]An excerpt from the hearing transcript containing the "Decisional Order" and, appended to it, those pages preceding it containing the law judge's review and assessment of the parties' evidence is attached.

allegations that he violated sections 91.29(a) and 91.9 of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Part 91 by operating as pilot in command, Civil Aircraft N65666 (a Stearman Aircraft) when it was not in an airworthy condition.[2]

Respondent's appeal in this matter focuses not on whether the evidence sufficiently establishes his operation of an unairworthy aircraft, but on whether the Administrator's action should have been dismissed by the law judge on grounds of res judicata or collateral estoppel.[3]

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[2]FAR sections 91.29(a) and 91.9 provide as follows:

"§ 91.29 Civil aircraft airworthiness.

(a) No person may operate a civil aircraft unless it is an airworthy condition.

91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[3]Under the doctrine of res judicata (claim preclusion), a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. Under collateral estoppel (issue preclusion), once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. Allen v. McCurry, 449 U.S. 90, 93 (1980). In order for the doctrine of res judicata to be applicable, there must be identity in the cause of action and identity of parties. Administrator v. Yarborough, 3 NTSB 1498, 1499 (1978). We have previously rejected the doctrine of res judicata where the Administrator has asserted it in an enforcement action against a pilot certificate, where the pilot was also an owner of the company holding an operating certificate which was the subject of a prior enforcement action arising from the same facts, ruling that the

The Administrator has filed a brief in reply.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, except as modified herein with regard to sanction. For the reasons that follow, we will grant respondent's appeal only with respect to the issue of sanction.

In order to properly address the matters raised by respondent, it is necessary to set forth the history of this enforcement action. On April 6, 1988, the Administrator issued an Amended Emergency Order which revoked respondent's mechanic certificate on allegations that he violated FAR sections 43.9(a)(1), and 43.13(a) and (b).[4] The emergency order of revocation, which served as the complaint in that proceeding, and which was docketed by the Board as SE-9181, alleged in pertinent part as follows:

> "2. On December 22, 1987, you [respondent] performed repairs to correct water damage and/or rot of the trailing edge of both lower wings of Civil Aircraft N65666, a Boeing B75N1 (PT-17) [the Stearman Aircraft] by forcing epoxy through cracks on the trailing edges and clamping them shut,

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operator and the pilot are separate and distinct parties. See Administrator v. Mikesell, 5 NTSB 1853 (1987), aff'd sub nom. Mikesell v. DOT, 894 F.2d 409 (9th Cir. 1990), cert. denied. 110 S. Ct. 2212 (1990); Administrator v. Denham, 5 NTSB 1761 (1987).

[4]FAR §§ 43.9 and 43.13 deal with the proper performance of maintenance, alteration, or preventive maintenance on aircraft, and the requisite recording of that work.

and then approved the said aircraft for return to service without making a proper entry of all the work performed in the maintenance records of the said aircraft.

3. On December 22, 1987, you performed repairs to correct the listed discrepancies on Civil Aircraft N46693, a Fairchild Model M62A (PT-19A) and then approved the said aircraft for return to service without making an entry in the maintenance records of the aircraft of the work performed or reference to data acceptable to the Administrator:

(a) Splitting in the center section of the trailing edge of the right wing; and

(b) Battery fluid that overflowed into the center section of the fuselage.

4. The repairs performed as described in paragraph 3 above, were not in accord with Technical Order No. 01-115 GA-2 which is the service manual for the said aircraft.

5. The use of epoxy to repair the damage referred to in paragraph 3(a) above was not in accordance with acceptable data."

On December 8, 1988, a hearing was held in SE-9181 before Judge Geraghty. During the hearing it became apparent that the Administrator had alleged only that respondent failed to make proper entries regarding his repair of the Stearman aircraft, but not that his repair of that aircraft was improper. The law judge denied the Administrator's motion to amend the complaint to include that allegation, and ultimately affirmed the remaining allegations and the revocation of respondent's mechanic certificate. Respondent appealed the law judge's initial decision to the full Board. In his reply brief, the Administrator withdrew Paragraph 2 of the Amended Order and that portion of the FAR §43.9(a)(1)

allegation pertaining to the Stearman aircraft. On August 14, 1989, the Board issued NTSB Order No. EA-2971, granting respondent's appeal in part by affirming the emergency order except as to the FAR section 43.13(b) allegation and by modifying the sanction to provide for a 90-day suspension of respondent's mechanic certificate.[5]

On May 16, 1989, the Administrator issued an amended order suspending respondent's ATP certificate. That order, which served as the complaint in this proceeding, alleges in relevant part as follows:

> "2. On December 23, 1987, you acted as pilot in command of Civil Aircraft N65666, a Boeing Model B-75NI belonging to the Confederate Air Force, on a flight in air commerce in the vicinity of Harlingen, Texas.
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> 3. At the time of the above-mentioned flight, said aircraft was in an unairworthy condition: A December 15, 1987 Condition Notice placed on the aircraft indicated that both lower wings were rotting out at the trailing edges and that such conditions were considered to be an imminent hazard to safety.
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> 4. You thereafter attempted to repair N65666 so as to correct these conditions. Your repairs, however, failed to accomplish this."

The Administrator's evidence consists of the testimony of two FAA inspectors who examined the Stearman

[5]Respondent's request that, in the event that the order in this proceeding is affirmed, the sanction be reduced from 120 to 15 or 30 days because of the Board's finding in the prior proceeding that he "genuinely believed that the aircraft was safe to fly..., Order EA-2971 at 8, is misleading. The Board's prior finding pertained only to the Fairchild Aircraft.

aircraft on December 15, 1987, and who placed a Condition Notice on the aircraft indicating that rot was coming out of the trailing edge of both wings. The maintenance officer for the aircraft owner, the Confederate Air Force, testified that he observed the inspection of the aircraft and he agreed with the inspectors when they showed him a sliver of wood, which they had removed from the aircraft's wing, that it indicated the existence of wood rot. The maintenance officer also testified that when one of the inspectors hit the top of the wing with his hand, he saw flakes of wood rot fall off of the wing.

Respondent testified that he did not see wood rot and therefore his repair, which consisted of gluing the wings back together, was not an unacceptable method of repair and he was reasonable in believing the aircraft was airworthy.[6] The law judge made a credibility determination in favor of the Administrator's witnesses. In the Board's view, the evidence is overwhelming that respondent, an ATP certificated pilot and a certificated mechanic, saw the rot and knew or should have known that under such circumstances his repair, which did not first include an inspection for internal damage, could not ensure that the aircraft was airworthy. We concur in the law judge's findings, which we adopt as our own.

[6]Respondent also noted his repair on the Condition Notice, which he then signed and forwarded to the FAA.

Respondent asserts, nonetheless, that the Administrator's complaint in this matter should be dismissed because the facts which gave rise to the complaint, i.e., the propriety of his repair on the Stearman aircraft, has already been litigated in the action taken by the Administrator against his mechanic's certificate. We disagree. The complaint against respondent's mechanic certificate was that because of his allegedly improper repairs and entries, he no longer possessed the qualifications to exercise the privileges of that certificate. The claim in this case however, is that respondent failed to properly exercise the privileges of his airman certificate by operating an aircraft which he knew or should have known was not airworthy. Thus, the Administrator's claims are different, the facts necessary to establish the claims are different, and the doctrine of res judicata is inapplicable. Similarly, the doctrine of collateral estoppel is unavailable to respondent since the issue of whether his repairs were such that they made the Stearman aircraft airworthy, and because of the withdrawal of certain of the allegations even the issue of his entries regarding his repairs on the Stearman aircraft, were never litigated in the prior proceeding.[7]

[7]Moreover, a violation of FAR §91.29(a) can occur without a violation of any section of Part 43. Administrator v. Bean, NTSB Order No. EA-3151 at 3 1990). A pilot in command is responsible for determining whether an aircraft is in condition for safe flight before he operates that aircraft. FAR §91.29(b).

Notwithstanding the foregoing, we reject the Administrator's argument, in response to respondent's appeal for a reduced sanction, that the fact that respondent was the mechanic who was assigned to repair the rot problem is an aggravating factor to be considered in fashioning an appropriate sanction. While Board precedent recognizes that a pilot who is also a mechanic should be held to a higher standard when his action in determining the airworthiness of an aircraft he operated is scrutinized, See e.g., Administrator v. D'Attilio, NTSB Order No. EA-3237 (1990); Administrator v. Doppes, 5 NTSB 50 (1985), we find that fairness dictates that where, as here, respondent's mechanic certificate has already been suspended for essentially the same acts complained of in this proceeding,[8] his possession of that certificate should not be used as a basis for increasing the sanction against his pilot certificate beyond that which is generally affirmed by the Board in similar cases. See e.g. Administrator v. Yarsley, NTSB Order No. EA-2764 (1988)(60 day sanction for a violation of FAR §§ 91.67(a)(1) and 91.29(a)); Administrator v. Doppes, 5 NTSB 50 (45 day sanction for violations of FAR §§ 92.29(a) and 91.9).

[8]The original complaint filed in the prior proceeding alleged improper entries regarding the repairs on the Stearman aircraft.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied, except with regard to the issue of sanction.

2. The Administrator's order and the initial decision are affirmed except with regard to sanction which is modified to a suspension of respondent's ATP certificate for a period of 45 days; and

3. The 45-day suspension of respondent's ATP certificate shall commence 30 days after service of this order.[9]

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[9]For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).